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Supreme Court of the United States

No. 446

OCTOBER TERM, 1949

HABEAS CORPUS

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

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OPINIONS OF THE COURT BELOW

Guy v. Utecht, 229 Minn. ——, 38 N. W. 2d 59, (Decided June 10, 1949).

Guy v. Utecht, 216 Minn. 255, 12 N. W. 2d 753.

Guy v. Utecht, 54 F. Supp. 287.

Guy v. Utecht, 144 F. 2d 913.

STATEMENT OF THE CASE

There is no printed record. If there is a certified copy of the typewritten record on file, it has not been served upon the warden or his attorneys. However, the petition for a writ of habeas corpus filed herein in January, 1949, contains the following:

> "The petitioner hereby incorporates by reference the entire record in said proceedings in the Supreme Court of Minnesota #33642 (216 Minn. 255) as Exhibit 'F'."

Therefore the opinion of the Supreme Court of Minnesota, recorded in *Guy v. Utecht,* 216 Minn. 255, 12 N. W. 2d 753, is before this court.

From that opinion the following facts appear and are established:

> "On December 12, 1929, Earl Guy, hereinafter called petitioner, was convicted of the crime of bank robbery and sentenced to life imprisonment. The board of pardons commuted his sentence on December 14, 1936, and he was forthwith released. On November 27, 1939, he was charged with the crime of burglary in the third degree, during the perpetration of which he assaulted an officer. In February 1940, he was charged with the crime of first-degree robbery. Subsequent to the filing of these charges, the board of pardons, on February 16, 1940, without notice and hearing, revoked and annulled his commutation of sentence. He was thereupon returned to prison to serve the remainder of his sentence.
>
> "Petitioner applied to the district court for a writ of habeas corpus, which was issued on December 22, 1942. The application for the writ alleged among other things that the board of pardons was without jurisdiction to

revoke or cancel its act of commutation of sentence, since such commutation was absolute, unconditional, a final termination thereof, and in the following language:

"'AND WHEREAS, the Board of Pardons has duly heard and considered said application and determined that it ought to be granted, when and if he secures employment, and upon condition that he keep steadily employed thereafter, lead a law abiding life, and for two years report to and counsel with his attorney, Arthur LeSueur, at least once a month, and that said LeSueur report to the Secretary of this board quarterly as to said Guy's conduct, employment and progress.

"'NOW THEREFORE, the Board of Pardons of the State of Minnesota, for good and sufficient reasons, as well as those appearing in said application and by virtue of the authority vested in said Board by the Constitution and Laws of the State of Minnesota does hereby "COMMUTE the said sentence now in force against the said Earl Guy to expire forthwith."

"'Supporting the application was a certified copy of the commutation as found in the records of the pardon board and the order of that board revoking such commutation. In the return to the writ, respondent contended that the commutation of sentence was conditional upon petitioner's leading a law-abiding life; that such condition had been violated; and that the action of the pardon board in revoking the commutation was proper. The trial court heard the matter and held the commutation to be unconditional and an absolute termination of sentence, and ordered petitioner released from custody. Respondent then filed a motion to vacate the order discharging petitioner, and in support thereof offered an affidavit wherein it was stated, among other things, that petitioner's exhibit attached to his

application for the writ of habeas corpus, and purporting to be a true and correct copy of the commutation of sentence executed by the pardon board, was in fact incorrect and false in that the following language appeared in the original commutation of sentence on file in the governor's office and did not appear in petitioner's copy thereof:

"'This commutation is granted and accepted upon the express understanding that this board reserves the right to determine whether any condition hereof has been violated and if violation be found to revoke this commutation and to cause the said prisoner to be returned to your institution to serve the remainder of his said sentence.'

"It was further stated that the original commutation of sentence was expressly accepted with such condition imposed upon petitioner, who subscribed his name thereto; that such acceptance and signature does not appear on petitioner's exhibit. Pursuant to respondent's motion and affidavit, an order was made setting aside and vacating the former order releasing petitioner. Respondent was permitted to file an amended return to the writ. Thereafter a second hearing was had upon the application and amended return and evidence adduced relating to petitioner's alleged violation of the conditions attached to the commutation of sentence. The court made findings of fact, conclusions of law, and order for judgment adjudging that petitioner's commutation of sentence was conditional; that the conditions thereof had been violated in that he had failed to lead a law-abiding life; and ordering that such commutation of sentence be revoked, the writ discharged, and petitioner remanded to the custody of respondent to serve the remainder of his sentence. From this order petitioner appeals. Thereafter, on August 25, 1943, an order of refer-

> ence was made by this court appointing the same trial judge as referee to take further evidence. This was done. Since this is an appeal involving a writ of habeas corpus, the matter is before this court de novo upon the evidence taken at the hearings before the district judge and referee. Minn. St. 1941, § 589.30 (Mason St. 1927, § 9768); State ex rel. Vik v. Sivertson, 194 Minn. 380, 260 N. W. 522."

The original commutation which was granted to the petitioner and which is on file in the office of the governor, contains on the face thereof the language above quoted, beginning with the phrase "This commutation is granted and accepted * * *".

The petitioner incorrectly quotes this reservation clause in his petition herein on page 4. As quoted by petitioner the clause reads "if violation can be found". The word *"can"* is erroneously inserted. "Can" is not in the reservation clause as stamped upon the commutation.

The petition herein is incorrect in another respect. It reads on page 14, "The 'Rubber Stamp' paragraph is not present in any document other than a *copy* of the commutation filed in the Office of the Governor."

The commutation on file in the governor's office is the only one which bears the signature of the chief justice, the governor and the attorney general, and is the original.

The petitioner quotes a portion of Minnesota Statutes 1941, Sec. 638.07, but omits the pertinent part thereof which is found in the last sentence of that section, and which reads as follows:

> "The records and all the files shall be kept and preserved *in the office of the governor,* and shall be kept open to public inspection at all reasonable times."

In determining that the original commutation on file in the governor's office was the original and not a copy, the Supreme Court of Minnesota relied upon the following facts:

That the commutation in the governor's office is the only one bearing the original signatures of the members of the pardon board, to-wit: the governor, chief justice and attorney general.

The statute requires that it be filed in the governor's office.

After the commutation had been executed by the members of the board of pardons, it was forwarded to the warden, who made three copies of that document, one for his records, one for the clerk of the district court where the conviction was obtained, and one for the prisoner.

At the trial of the first habeas corpus case, the copy made for the clerk of the district court was produced, and it bears thereon the reservation clause; the copy made for the warden's file was also produced and it also bears the reservation clause. The copy given to Earl Guy himself was not produced.

The reservation clause must have been upon the document when copied by the warden, otherwise the copies would not have contained it.

Furthermore, the Honorable Harry H. Peterson, one of the judges of the Supreme Court of Minnesota, and who was at the time the attorney general and member of the pardon board who signed this commutation, testified that the reservation clause sustaining the right to revoke the commutation was stamped upon the commutation when it was signed by him (see printed record of testimony taken before the referee in the State Supreme Court in the Earl Guy case on page 57).

The petitioner failed to live up to the conditions under which his sentence was commuted. He did not lead a law-abiding life.

Quoting again from the record in 216 Minn., the following facts appear on page 268:

> "On November 27, 1939, the River Lake Motors Company was burglarized by petitioner and another. While attempting to escape he was shot. That evening police officers questioned him at home. He was in bed and in great pain. His garments disclosed the bullet hole. He was removed to the hospital, and the X-rays taken at that time revealed the bullet lodged in petitioner's pelvis. Later X-rays taken by the prison authorities reflected the same condition.
>
> "In February 1940 petitioner was accused of taking part in the Hans Rosacker robbery. The evidence is overwhelming that he drove the holdup automobile and shared in the proceeds of the crime. With his associates in crime he planned to burglarize two other business establishments, but these plans failed to materialize.
>
> "Petitioner alleges in his application for the writ that he has complied with the conditions of his commutation of sentence, but upon the hearing he made no offer to refute the charges against him. He had ample opportunity to do so."

The sentence of the petitioner was commuted upon condition that he lead a law-abiding life. While he was at liberty he committed at least the two robberies referred to in the last quotation above and planned others.

Nowhere in his petition for a writ of habeas corpus herein nor in his petition for a writ of certiorari herein, nor in his brief, does the petitioner allege that he led a law-abiding life during the time that he was at liberty from the prison.

The warden will discuss the petitioner's arguments herein in the same order in which they are set forth in the petitioner's brief.

ARGUMENT

I.

The Commutation Which was Granted to Earl Guy in 1936 was a Conditional One, Reserving the Right to Revoke it in case the Petitioner Failed to Lead a Law-Abiding Life.

The reasons why the original commutation which is on file in the governor's office is the original and not a copy are well set forth in the opinion of the Supreme Court of Minnesota in the Earl Guy case, supra, and in the above quotations therefrom.

The original commutation on file in the governor's office is signed with the original signatures of the governor, chief justice and the attorney general, who constitute the board of pardons.

One of the present justices of the Minnesota Supreme Court who was then attorney general, testified that the clause reserving the right to revoke the commutation was on the original when he signed it. After being signed, the original was sent to the warden at Stillwater, who made three copies, one for his files, one for the clerk of the court in which the conviction was had, and one for the prisoner. The copies made for the clerk of the district court where the conviction was had and for the warden's file were produced at the trial

in the District Court of Minnesota, and they carry thereon the reservation of the right to revoke. That reservation could not have been copied thereon unless it was on the original from which the warden copied it.

The original commutation on file in the governor's office bears the signature of Earl Guy under the word "Accepted".

No constitutional question is presented in this argument. The question of what constitutes the original record of the board of pardons is a question for determination by the state court, and its determination is final.

The foregoing constitutes a complete answer to points I and II of petitioner's brief.

II.

All the Points Raised by the Last Petition for a Writ of Habeas Corpus (Denied by the District Court of Minnesota in February, 1949, and Affirmed by the Supreme Court of Minnesota June 10, 1949) were Disposed of in the case of Guy v. Utecht, 216 Minn. 255. No New Points were Raised by the said Last Petition for a Writ of Habeas Corpus. The Doctrine of Res Judicata Applies.

The Supreme Court of Minnesota in its last opinion denying the issuance of a second writ of habeas corpus, which decision was handed down June 10, 1949, points out: "We considered the questions raised in this appeal in *Guy v. Utecht,* 216 Minn. 255, 12 N. W. 2d 753." The court then points out that there is no new point raised by the second petition for a writ. The court says:

"The only new documentary evidence presented to the court at the hearing on the order to show cause was a copy of a notice sent by the clerk of the board of pardons notifying appellant that his sentence had been commuted. Petitioner's Exhibit A. It was a form card, and said nothing about any conditions attached to the commutation. Apparently such card was sent to every prisoner whose sentence was commuted. It was claimed that appellant was unable to produce it in the first action because it had been mislaid and just recently found. The card adds nothing to appellant's rights. By this card, he is again attempting to attack collaterally the original commutation on file in the governor's office, which contains the conditions on which the commutation was granted, and the clause reserving to the pardon board the right to determine whether a condition had been broken, both set out in full in Guy v. Utecht, supra. We held in the prior action that the record of a pardon kept in the governor's office pursuant to M. S. A. § 638.07 is an original record and cannot be collaterally attacked.

"At the hearing on the order to show cause, appellant called one Louise Jefferson, who in 1936, when the commutation was granted, was a stenographer in the office of the board of pardons. Appellant contends that her testimony substantiates his claim that the rubber stamp which conditioned the commutation was affixed at the state prison and not in the office of the board of pardons. Her testimony does not bear out appellant's contention. A reading of it clearly so demonstrates."

The Supreme Court of Minnesota in its last opinion then holds that the doctrine of res judicata is applicable to the facts in this case. The court says:

> "* * * The matter is here again on the same set of material facts. In State ex rel. Du Fault v. Utecht, 220 Minn. 431, 19 N. W. 2d 706, 161 A. L. R. 1316, we held that the basis of the common-law doctrine permitting a renewal of the petition for habeas corpus on the same set of facts no longer exists, and that the doctrine of res judicata applies."

In the case of *State ex rel. Du Fault v. Utecht,* 220 Minn. 431, 446, 19 N. W. 2d 706, the question of the application of the doctrine of res judicata is given extended consideration. The court concluded:

> "As has been stated, in this state a special appeal statute covering writs of habeas corpus has been enacted. This statute, in addition to providing for an appeal, also provides for a trial de novo of such appeals in this court. In view of this situation, we are of the opinion that the basis of the common-law doctrine permitting a renewal of the petition on the same facts no longer exists, and that the doctrine of res judicata applies.

The question of whether the doctrine of res judicata applies in habeas corpus case in a state court is a question of state interest only. It does not raise any constitutional question under the federal constitution.

> "* * * The highest court of a state is the final arbiter of what the state law is, and, when that court has spoken, its decision must be accepted by the federal courts as defining the law of the state." (Citing cases) *Guy v. Utecht,* 144 F. 2d 913, 915.

Although the federal courts have usually held that the doctrine does not apply in the federal courts, yet it is now

the law that the federal court may base its refusal to discharge on a prior refusal. To do so is not to deprive the petitioner of any constitutional right.

The following is quoted from 28 U. S. C. A. § 461, p. 162:

> "* * * But in the exercise of its sound, judicial discretion 'to dispose of the party as law and justice may require,' a federal court may base its refusal to discharge on a prior refusal; and, as a safeguard against abuse of the writ, the applicant in any case may be required to show whether he has made a prior application and, if so, what was done on it. Salinger v. Loisel (La. 1924) 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989, reversing (C. C. A. 1923) 295 F. 498."

An illuminating article on the subject "Limiting the abuse of Habeas Corpus" written by the Hon. John J. Parker, is found in 8 F. R. D. 171. It is there pointed out that prior denials of the writ may be taken into consideration in denying an application for a writ of habeas corpus, and attention is directed to Section 2244 of the Revised Code which "makes it discretionary with the judge whether to entertain the petition of a prisoner who has been convicted of crime, where it appears that the legality of his detention has been determined on a prior application for habeas corpus and the judge is satisfied that the ends of justice will not be served by further inquiry."

So that it now may be said that in Minnesota the doctrine of res judicata applies, and that the same doctrine in a modified form applies in the federal courts which may base a refusal to issue the writ upon a prior refusal.

III.

There is No New Evidence Presented to the State District Court or the State Supreme Court Upon this Second Application for a Writ of Habeas Corpus.

In concluding Subdivision III of his brief the petitioner says:

> "The evidence of the minute record and copy book was not presented to either the trial court or to the Supreme Court upon the hearing of the first petition; * * *."

This is contrary to the fact. The warden refers to the printed testimony of Louise Jefferson in the evidence taken before the referee in the Supreme Court in the first case. It there appears that the copy book was presented in the Supreme Court, and that the reservation of the right to revoke does not appear upon the copy book. The stamp was not placed on the copy in the book.

The minute record was also presented to the Supreme Court as shown by the evidence taken before the referee and printed on page 18 of the transcript of that testimony Attention is there called to "Petitioner's proposed Exhibit B, consisting of two typewritten sheets". This is the same minute record to which the petitioner refers in his present petition and brief.

In concluding Subdivision III of its brief, counsel says "nor was the validity of the restoration of civil rights and its consequence adjudicated".

In Minnesota the pardoning power is vested in a board consisting of the governor, the chief justice and the attorney general. Only this board has the power to grant commuta-

tions. No matter if the governor did restore the convict to his civil rights, it did not operate as a commutation or a pardon, as the governor has no pardoning power.

Further, in the concluding paragraph of his brief the petitioner says "the questions of a collateral attack on the records were not raised upon the initial proceeding on the first petition".

This question was raised and decided by the Supreme Court in that case. See *Guy v. Utecht,* 216 Minn. 255, 262, where the court says:

> "* * * He urges that respondent, in producing and relying upon the record of commutation as found on file in the governor's office, is in effect making a collateral attack upon the commutation. The fallacy of petitioner's position is his erroneous assumption as to what constitutes the original record. Holding as we do, that the record in the governor's office is the original, it follows that petitioner's attempt now to question it constitutes a collateral attack. A public record required to be kept is not open to collateral attack. The verity of such a record is conclusive. 45 Am. Jur., Records and Recording Laws, p. 423, § 9."

Petitioner concludes the body of his brief with this language:

> "* * * The testimony of Louise Jefferson was not previously had, nor was the notification introduced, as this was newly discovered evidence."

This claim is answered by the quotation from the opinion of the State Supreme Court in 38 N. W. 2d p. 59, and the above quotation from page 60 thereof.

In concluding his argument in opposition to the granting of the writ of certiorari, the warden wishes to reiterate the following:

Petitioner did not in his petition for a writ of habeas corpus filed in January, 1949, allege that he had led a law-abiding life during the period that he was at liberty under the conditional commutation. He does not make any such allegation in his petition for a writ of certiorari herein. He does not make any such allegation in his brief in support of his petition herein.

The Federal District Court of Minnesota noted this avoidance of the merits of the controversy in its opinion denying the issuance of a writ of habeas corpus to the petitioner in the following language:

> "* * * The Supreme Court of Minnesota on a hearing de novo has found that the petitioner's conditional commutation was violated and that this fact appears conclusively. Not only was the showing in this regard uncontroverted, but even in this petition which is now presented to this court, there is an utter absence of any allegation or contention that if a hearing was granted by the Board of Pardons or by this court, he could demonstrate that he had led a law-abiding life since his release in 1936. He does not attempt to deny, in the petition before this court, the burglary in 1939 or the robbery in February, 1940." *Guy v. Utecht,* 54 F. Supp. 287, 289.

On November 27, 1939, Earl Guy, while at liberty under his conditional commutation, was interrupted in his attempt to burglarize the River Lake Motors in Minneapolis. He was then shot in the pelvis but escaped. On the evening of that day the police officers located Earl Guy at his father's house, 4317-12th Avenue South, in Minneapolis. He was in bed suffering from a bullet wound in the pelvis and sent to the hospital. Until Earl Guy shall explain how and when he

got that bullet wound (he still carries the bullet in his body), his application for a writ of habeas corpus deserves but little consideration. (See printed transcript of the testimony taken in the first Earl Guy case and on file in the Supreme Court of Minnesota, and found at pages 111, 114-145, 249-296.)

IV.

Motion to Dispense with the Printing of the Record

The petitioner moves that a certified copy of the typewritten record be considered in said proceedings in lieu of the printed copy of the record. No typewritten record has been served upon the warden. Counsel for respondent do not know what is in the certified copy of the typewritten record if one is on file in this court.

Such a copy should contain not only a copy of the proceedings on the present petition, but a full copy of the testimony taken in the State lower court and in the State Supreme Court upon the first hearing of this case.

The petitioner attempts to incorporate by reference the entire record in the proceedings in the first Earl Guy case. Therefore, unless the typewritten record on file in this court contains the evidence upon which the Supreme Court of Minnesota acted in the first Earl Guy case, the record is incomplete.

CONCLUSION

WHEREFORE, respondent respectfully submits that a writ of certiorari should be denied.

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